

Office of Chief Counsel  
Internal Revenue Service

**memorandum**

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PKWebb

date: 2/1/03

to: Internal Revenue Service  
Large and Mid-Size Business Division  
Attn: David Schwarcz, Team Manager  
185 Lennon Lane, Suite 200  
Walnut Creek, CA 94598

from: Paul K. Webb, Attorney (LMSB: Area 5)

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subject: Disclosure/3rd Party Contacts - (b)(7)a, (b)(7)c

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**DISCLOSURE STATEMENT**

This advice constitutes return information subject to I.R.C. § 6103. This advice may also contain confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, may be subject to the attorney work product privilege. Accordingly, any recipient of this document, including Examination or Appeals, may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to Examination, Appeals, or other persons beyond those specifically indicated in this statement. This document may not be disclosed to the taxpayer or its representatives.

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This memorandum responds to your request for advice of January 17, 2002. This advice relies on facts provided by you to our office. If you find that any of the stated facts are incorrect, please advise us immediately so that we may modify and correct this advice.

This advice is subject to 10-day post-review by the National Office. CCDM 35.3.19.4. Accordingly, we request that you do not act on this advice until we have advised you of the National Office's comments, if any, concerning this advice.

### Issues

- Issue 1: Whether disclosing certain taxpayer information to (b)(7)a, (b)(7)c in order to determine the taxpayer's proper tax liability violates I.R.C. § 6103?<sup>1</sup>
- Issue 2: Whether discussions with (b)(7)a, (b)(7)c must be reported to the taxpayer as third party contacts under I.R.C. § 7602?

### Summary Answers

- Answer 1: You may only disclose taxpayer information if (1) the information sought is not otherwise reasonably available, and (2) it is necessary to make the disclosures in order to obtain the information sought.
- Answer 2: If you disclose any taxpayer information to (b)(7)a, (b)(7)c, you must notify the taxpayer of your third party contacts with (b)(7)a, (b)(7)c unless doing so would result in reprisal against someone.

### Facts

The Internal Revenue Service ("Service") is currently auditing (b)(7)a, (b)(7)c ("X") for its taxable years ending (b)(7)a, (b)(7)c through (b)(7)a, (b)(7)c. X filed consolidated Federal tax returns with its various subsidiaries during the audited years. The (b)(7)a, (b)(7)c Company ("Y"), a wholly-owned subsidiary of (b)(7)a, (b)(7)c, was a limited partner in the (b)(7)a, (b)(7)c ("Z") partnership from (b)(7)a, (b)(7)c to (b)(7)a, (b)(7)c. The (b)(7)a, (b)(7)c audit team ("the audit team" or "the team") has recently opened a related TEFRA audit of (b)(7)a, (b)(7)c for its taxable years ending (b)(7)a, (b)(7)c to (b)(7)a, (b)(7)c.

(b)(7)a, (b)(7)c consists of two partners: (1) (b)(7)a, (b)(7)c, which owns (b)(7)a, (b)(7)c% of (b)(7)a, (b)(7)c's profits and losses and (b)(7)a, (b)(7)c% of (b)(7)a, (b)(7)c's capital, and (2) (b)(7)a, (b)(7)c, a limited liability company. (b)(7)a, (b)(7)c is designated as the tax matters partner ("TMP") for (b)(7)a, (b)(7)c. The TMP mailing address listed on the (b)(7)a, (b)(7)c partnership returns state: "(b)(7)a, (b)(7)c"

(b)(7)a, (b)(7)c registered as a tax shelter pursuant to Section 6111(c). (b)(7)a, (b)(7)c generated \$ (b)(7)a, (b)(7)c in ordinary losses for (b)(7)a, (b)(7)c during the years at issue. According to (b)(7)a, (b)(7)c's returns, the majority of

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<sup>1</sup>All citations herein are to Title 26, the Internal Revenue Code, unless otherwise stated.

these losses stem from (b)(7)a, (b)(7)c [REDACTED]. The team issued Information Document Requests ("IDRs") to [REDACTED] and [REDACTED] regarding [REDACTED]'s operations and is currently awaiting responses.

[REDACTED] is apparently the managing member of [REDACTED]. In [REDACTED], [REDACTED] executed the [REDACTED] partnership agreement as the managing member of [REDACTED]. [REDACTED] also recently executed a Form 872-P on behalf of [REDACTED] listing himself as the managing member of [REDACTED] (the TMP of [REDACTED]).

(b)(7)a, (b)(7)c [REDACTED]

(b)(7)a, (b)(7)c [REDACTED]

- (b)(7)a, (b)(7)c [REDACTED]
- (b)(7)a, (b)(7)c [REDACTED]
- (b)(7)a, (b)(7)c [REDACTED]
- (b)(7)a, (b)(7)c [REDACTED]

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(b)(7)a, (b)(7)c [REDACTED]

(b)(7)a, (b)(7)c

(b)(7)a, (b)(7)c

The audit team contacted the Office of Tax Shelter Analysis for guidance when it discovered that [REDACTED] was a registered tax shelter. The Office of Tax Shelter Analysis, in turn, provided the team with (b)(7)a, (b)(7)c [REDACTED] (b)(7)a, (b)(7)c

(b)(7)a, (b)(7)c

(b)(7)a, (b)(7)c

### Analysis

#### I. Disclosure Considerations - I.R.C. § 6103.

Tax returns and return information are confidential and, with few exceptions, may not be disclosed by an officer or employee of the United States. I.R.C. § 6103(a). "Return information" is defined as:

a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or

with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense . . . .

I.R.C. § 6103(b)(2). The term "taxpayer identity" includes the name of a person, including his or her mailing address, taxpayer identification number, or any combination thereof. I.R.C. § 6103(b)(6).

(b)(7)a, (b)(7)c

. To do so, the team would simply limit its side of the discussion to generic inquiries, leaving out any specific names and other taxpayer identifying information. For example, the team could inquire as to: (1) (b)(7)a, (b)(7)c

. All of these inquiries can be presented without disclosing taxpayer information, including [REDACTED], [REDACTED], and [REDACTED]'s identities. However, such generic inquiries may prove ineffective as they may result in considerable undiscovered information. Additionally, the Office of Tax Shelter Analysis has already asked (b)(7)a, (b)(7)c similar generic inquiries. Thus, additional generic inquiries may prove fruitless. Given these considerations, we will address whether an applicable exception allows the Service to disclose limited return information for the purpose of gathering useful data for the audits.

A. The Tax Administration Exception - I.R.C. § 6103(k)(6).

A Service employee may, in connection with his or her official duties relating to an audit and with respect to the correct determination of tax, disclose return information to the extent that such disclosure is necessary to obtain information not otherwise reasonably available. I.R.C. § 6103(k)(6). The regulations associated with Section 6103(k) help define the circumstances which allow a Service employee to disclose a taxpayer's identity and return information. Treas. Reg. § 301.6103(k)(6)-1. In pertinent part, the regulations state that such information may be disclosed in the context of an audit:

(a) *Disclosure of taxpayer identity information and fact of investigation in connection with official duties relating to examination . . . .* In connection with the performance of official duties relating to any examination . . . an officer or employee of the Internal Revenue Service . . . therefore is authorized to disclose taxpayer identity information (as defined in section 6103(b)(6)), the fact that the inquiry pertains to the performance of official duties, and the nature of the official duties in order to obtain necessary information relating to performance of such official duties or where necessary to accomplish any activity described in subparagraph (6) of paragraph (b) of this section. . . .

Treas. Reg. § 301.6103(k)(6)-1(a).

Section 6103(k)(6) and the regulations posit three requirements, which if present allow disclosure of return information: (1) the information sought is "with respect to the correct determination of tax, or the amount to be collected or with respect to the enforcement of any other provision of the Code," (2) the information sought is "not otherwise reasonably available," and (3) it is necessary to make the disclosures in order to obtain the additional information sought. I.R.C. § 6103(k)(6). See also, DiAndre v. United States, 968 F.2d 1049 (10<sup>th</sup> Cir. 1992), cert. denied, 507 U.S. 1029 (1993); Treas. Reg. §§ 301.6103(k)(6)-1(a), (b).

In the present audits, the team intends to contact (b)(7)a, (b)(7)c to assist in determining the proper amount of tax owed by [REDACTED] and [REDACTED] (as a partner in [REDACTED]) during the years under audit. Thus, the first element is met. The Service must also be able to show that the information the team expects to obtain from (b)(7)a, (b)(7)c is not reasonably, accurately and timely obtainable from other sources, and that any disclosures to (b)(7)a, (b)(7)c are necessary to obtain said information. See I.R.C. § 6103(k)(6); Treas. Reg. §§ 301.6103(k)(6)-1(a), (b).

With respect to whether the disclosure is necessary in order to obtain information, courts agree that there is a certain minimal amount of information that must be disclosed in order to obtain information. See Fostvedt v. United States, 824 F. Supp. 978 (1993), aff'd 16 F.3d 416 (10<sup>th</sup> Cir. 1994) (table cite) (full opinion at 1994 U.S. App. LEXIS 854) ("We are confident no investigation could ever proceed without disclosure of such minimal, nonsensitive facts as the taxpayer's name, tax number . . . ."); Rhodes v. United States, 903 F. Supp. 819 (M.D.

Pa. 1995) (same). Clearly, in order to obtain specific information about [REDACTED] and/or [REDACTED] rather than generalized information about abusive tax shelters, the team will have to disclose the taxpayers' names. In determining whether the information is otherwise reasonably available, which is an adjunct of whether the disclosure is necessary to obtain the information, the appropriate test is whether the information sought

cannot, under the facts and circumstances of the particular case, otherwise reasonably be obtained in accurate and sufficiently probative form, or in a timely manner, and without impairing the proper performance of the official duties, or if such activities cannot be accomplished without such disclosure.

Treas. Reg. § 301.6103(k)(6)-1(a).

The audit team issued IDRs to [REDACTED] and [REDACTED] regarding [REDACTED]'s investment and [REDACTED]'s [REDACTED]. The [REDACTED] IDR responses are not yet due. Hence, it is unclear what information and types of information will be "reasonably available" from [REDACTED]. It is possible that [REDACTED] will be completely forthcoming and provide all information and documents requested and related explanations. In such a situation, any information sought from (b)(7)a, (b)(7)c [REDACTED] would be "reasonably available" from other sources. However, if the IDR responses are incomplete, vague or non-responsive to the Service's requests, then we believe that, under the facts and circumstances of this case, certain information sought from the informant regarding the [REDACTED] would not be reasonably available from other sources. However, (b)(7)a, (b)(7)c [REDACTED]

As for the "necessary" prong of the exception, if the audit team determines that [REDACTED] is uncooperative in responding to the IDRs and that (b)(7)a, (b)(7)c [REDACTED] can provide assistance, it must only disclose so much as is necessary to obtain the information sought. We believe that the audit team can successfully achieve this by asking (b)(7)a, (b)(7)c [REDACTED]

[REDACTED], without having to disclose any other taxpayer specific information or taxpayer identities. See e.g., DiAndre, 968 F.2d

at 1053 (holding that Section 6103 does not prohibit requesting additional information beyond that not otherwise reasonably available if the additional requests require no further disclosures).

In the event that [REDACTED] provides requested documents and information (for example, in response to the outstanding IDRs), but the Service cannot obtain a meaningful explanation of such,

(b)(7)a, (b)(7)c

[REDACTED]. See Jones v. United States, 898 F. Supp. 1360, 1381 (D. Neb. 1995), aff'd 207 F.3d 508 (8<sup>th</sup> Cir. 2000), aff'd 255 F.3d 507 (8<sup>th</sup> Cir. 2001). However, any document disclosure determinations should be made with the assistance of this office on a document by document basis.

In summary, we recommend the following:

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(b)(7)a, (b)(7)c

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(b)(7)a, (b)(7)c

(b)(7)a, (b)(7)c

[REDACTED]. See DiAndre, 968 F.2d at 1053.

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(b)(7)a, (b)(7)c

(b)(7)a, (b)(7)c



- (b)(7)a, (b)(7)c  
(b)(7)a, (b)(7)c

## II. Third-Party Contact Information - I.R.C. § 7602.

A Service employee may not contact any person other than the taxpayer with respect to the determination of tax liability without providing reasonable advance notice to the taxpayer that contacts with other persons may be made. I.R.C. § 7602(c)(1). Additionally, the Service must periodically provide taxpayers a record of all persons contacted during such period. I.R.C. § 7602(c)(2).

If the audit team seeks more than generic information from (b)(7)a, (b)(7)c, i.e., the team discloses (b)(7)a, (b)(7)c's identity for purposes of gathering specific information, then, barring an exception, the general rule of Section 7602(c)(2) will apply. There are three exceptions to the general rule of Section 7602(c)(2). See I.R.C. § 7602(c)(3) (authorized, reprisal or criminal investigation). In the present case, only the reprisal exception appears to be potentially applicable.

Under I.R.C. § 7602(c)(3)(B), the Service is not required to provide the taxpayer a record of specific third party contacts if a determination is made that providing such notice may involve reprisal against any person. A reprisal determination must be made for all contacts with third parties. See I.R.M. 8.1.5.8.9.3. The determination must be made on a case by case basis. Id. A blanket determination for different types of contacts is not appropriate. Id.

In situations where the Service employee cannot make a reprisal determination based upon facts already known, the employee should advise the third party that by law the Service is required to include his or her name on a list of contacts that is provided to the taxpayer. Id. The employee should also inquire as to whether the third party has any reason to believe that reprisal against any person may occur. Id. The inquiry should not, however, be made in such manner so as to influence the response from the third party. Id.

The following language is set forth in I.R.M. 8.1.5.8.9.3. and is suggested for use in notifying an informant of Section 7602's requirements:

By law I am required to include your name on a list of parties we have contacted. This list is sent at least once a year to [state taxpayer's name]. If you believe that including your name on the list may result in reprisal against any person, we can exclude you from the list. If you have any reason to believe that reprisal against any person may occur, you should call me at the telephone number listed above by [insert a date that is ten calendar days from the day the letter is mailed].

(b)(7)a, (b)(7)c

(b)(7)a, (b)(7)c

In the present case, (b)(7)a, (b)(7)c

(b)(7)a, (b)(7)c

#### Conclusion

The above advice sets forth a basic framework of steps which the audit team should utilize. If additional disclosure issues arise during the course of the audits, we recommend that you contact this office for further advice.

Please telephone attorney Paul K. Webb at (415) 744-9217 if you have any questions regarding this memorandum.

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse

effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

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